

# Post-modern state, tax law and alternative dispute resolution mechanisms

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## 1. Introduction

The present study aims to analyse to what extent tax arbitration, as an alternative dispute resolution mechanism, can be legal-theoretically framed, particularly in the context of legal post-modernity. The main ideas are that arbitration is a reflection of the current tendency to the disempowerment of States, and can be seen not only as a challenge in order to achieve a better tax justice, but also as a risk that can put essential legal dimensions in a situation of crisis, such as the rule of law. Besides, it is emphasized that arbitration is merely one mechanism amongst others with the finality of unburdening the demanding activity of tax courts. Having those purposes in mind, the work is structured as follows: first, it intends to establish an adequate framework of what post-modernity is, from a legal point of view (section 2.); after that, the focus will converge to tax law in particular and to its new configuration (section 3.); subsequently, attention will be paid to the alternative dispute resolution procedures in tax law (section 4.); and finally some concluding and personal remarks will be aligned (section 7).

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Before addressing directly the subjects under analysis, it is probably relevant to present some premises based on which all considerations will be made. This previous approach seems to be important because the questions related to alternative means to solve legal conflicts are not absolutely linear and they largely depend on methods, ideas and theories that, if changed, can also change assumptions and conclusions.

So, first of all, it is relevant to remark that an internal and comparative approach will be adopted here, using examples from different legal orders (mainly Portugal, Spain, Germany, USA). It means that the work will not pay attention to international issues and instruments (for example, the questions that arise from extraterritorial tax conflicts or international double taxation), but merely to internal conflicts.

Secondly, this one intends to be a study on legal science, which means that references will be made to legal norms (principles and rules), and not to other realities, such as data, numbers, statistics, empiric tests or merely opinions.

Thirdly, despite the approach and references to post-modern ideas, the main thought of the author remains faithful to the modern way of thinking, State- and reason-based.

## 2. Modern and post-modern state (legal focus)

In general, and using the words of Arran Gare, *post-modernity* is the state of culture after the disintegration of modernity<sup>1</sup>. In such a wide sense, such expression denotes an existence model based on the idea of *deconstruction*, from various points of view, but essentially from the points of view of theory of knowledge and theory of social structures. In a simple manner, it suggests the decline of reason and abstract thought — the refusal of universal truths and the *end of metanarratives* — and the simultaneous rise of the civil society and the market, the former through the special attention to subsystems, subcultures and minorities and the latter via the progressive “commodification” of social life<sup>2</sup>.

It would be, in a word, the apology of *relativism*.

<sup>1</sup> ARRAN GARE, “*Post-modernism as the Decadence of the Social Democratic State*”, in *Democracy & Nature*, Vol. 7, 1, 2001, p.77.

<sup>2</sup> See ROGER COTTERRELL, “*Sociological Interpretations of Legal Development*”, in *European Journal of Law and Economics*, 2, 1995, p. 348.

Strictly from a legal point of view, and departing from those ideas, it is possible to say that *post-modernity* refers to a normative system based (i) on the disempowerment of the institutional structure of the State and (ii) on the emergence of particularity.

Indeed, and in the first place, the post-modern theory assumes the existence of a State's weakening process, suggesting its decadence<sup>3</sup>, its privatization (*Entstaatlichung*)<sup>4</sup>, its change of functions (*Funktionswandel*), and even the possibility of its ending<sup>5</sup>. Even knowing that the latter can be a radical approach, it cannot be disregarded that presently, the traditional State-based structures are progressively being replaced by several other regulatory systems and control networks (*unterschiedlicher Regulierungs- und Steuerungsnetzwerk*). It is a fact that the different classic powers of State public bodies — mainly, legislative and administrative prerogatives — are being more and more assigned to other actors, such as *transnational* entities (for example, the European Union and conventional international organisations, such as the United Nations, the International Monetary Fund or the Organisation for Economic Co-operation and Development), or other arrangements and structures with undefined legal nature (such as independent agencies, regulatory bodies, etc.). As a consequence of this process, the market and the civil society, embodied in several *parallel* groups or associations, emerge as important sources of influence, alongside public powers.

In second place, as a reflection of the decline of rational thought and disbelief of science (scepticism), the actions of public powers are increasingly less based on pure rational reasons (e. g., generality, impartiality, proportionality), and are more grounded on emotional or sensitive reasons, such as the fear of losing elections, the aim of protecting special minorities or the obligation to fight against singular dangers or risks. Some doctrine refers the existence of a “sustained invasion of legal rationality by policy demands and prescriptions, so that the law appears ever more clearly as an

<sup>3</sup> See, once again, ARRAN GARE, “*Post-modernism...*”, cit., p.77.

<sup>4</sup> See PETER PERNTHALER THOMAS VON WIESENTREU, “*Privatrechtliche Gestaltungselemente des öffentlichen Rechts*”, in *Zeitschrift für öffentliches Recht*, 65, 2010, p. 498.

<sup>5</sup> VOLKER BOEHME-NESSLER, “*Das Endedes Staates? Zu den Auswirkungen der Digitalisierung auf den Staat*”, in *Zeitschrift für öffentliches Recht*, 64, 2009, p. 161. The author, with a lucid analysis, sees the reference to that end as a “perspective distortion”, based on an “un-historical point of view” (p. 188).

instrument of transient policies determined (...) rather than as an expression of rationally elaborated principle”<sup>6</sup>. In this context, it can be said that the traditional rule of law principle<sup>7</sup> is declining, and (from a sociological point of view, not from a legal one) the existence of unconstitutional and particular laws is perfectly understood— that is, laws created with one single purpose and sometimes with one particular addressee —, with the goal of regulating special situations, such as the protection of subgroups, the fight against terrorism or the salvation of strategic companies or banks.

As can be easily understood, this deconstruction process has also impact on the legal structures concerning the resolution of conflicts, emphasizing the fact that traditional judges can be (or must be) replaced by new players (arbitrators, mediators, etc.), at the same time as traditional judgments can be replaced by new forms of legal resolution. There are several reasons for that but, for now, it is sufficient to highlight the discredit of traditional dispute resolution methods, as a consequence of their bureaucratic and sometimes stressful and traumatic nature.

From a critical perspective, it is worth mentioning that, despite the attractive nature of these proposals, the impulsive defence of a de-rational and market-centred way of thinking might be rash and imprudent. Just think of the fact that it is not possible to view contemporary society as reducible to the interplay of (singular) market interests alone, since “important social relationships, processes, and institutions may be misunderstood if analysed in terms of purely economic interests or calculations of assumed economically rational choices by actors”<sup>8</sup>.

In any case, the crisis in which modernity has submerged cannot be denied.

And what about tax law? To which extent are taxes and their discipline affected by these approaches?

So far, the main focus of our considerations has been pointed at the general and abstract conception of post-modern state, without mention-

<sup>6</sup> See ROGER COTTERRELL, “*Sociological Interpretations of Legal Development*”, cit., p.354.

<sup>7</sup> To avoid any kind of misunderstanding or communicative divergence, and correctly defending a material identification between “*Rule of law*”, “*Rechtsstaat*”, and “*État de Droit*”, see ALBRECHT WEBER, “*RechtsstaatsprinzipalsgemeineuropäischesVerfassungsprinzip*”, in *ZeitschriftfüröffentlichesRecht*, 63, 2008, p. 270.

<sup>8</sup> Once again, see ROGER COTTERRELL, *Sociological Interpretations of Legal Development*, cit., p. 348.

ing specifically the essential core of this work: the alternative dispute resolution mechanisms in tax law.

Trying to refine our analysis, and trying to establish a relevant connection between those considerations and this legal segment, it can be convenient to understand one of the more relevant features or peculiarities of current tax systems: flexibility.

### 3. The flexible tax law

Traditionally — i.e., under the premises of the modern State theory —, tax principles and tax rules were often seen as a strict and rigid instrument based on public powers and serving exclusively for Public Interest. According to that, “classic” tax legal systems were mostly based on public administrative structures, acting in a legal-based, abstract, inflexible and non-open way, giving little room for concessions or compromises<sup>9</sup>.

In contrast to those traditional approaches, it is possible to say that current tax legal systems are less dependent on the classic rigid nature of law (*lex stricta* principle). On the contrary, they are mostly — and increasingly — characterized on the basis of a flexible comprehension of public powers, frequently appealing to case-based solutions and to the cooperation and involvement of other entities. In this sense, attentive and cooperative tax law, focused on concrete problems and individual equity, can be seen as a synonymous of post-modern tax law, as opposed to a unitary, homogeneous and abstract legal construction<sup>10</sup>.

Simultaneously, a critical tax theory emerges, censuring the “hegemonic quality” of classic concepts (such as tax equity, per example), and denouncing the “ideological hegemony” of the dominant group (economically privileged, able-bodied, straight, white males), which defending a very partial version of fairness has been able to maintain its power<sup>11</sup>.

This is the background for the acceptance of a *flexible tax law*.

In order to better understand these assertions, let us try to present some more tangible dimensions, underlining (i) the physiology of tax norms

<sup>9</sup> KLAUS TIPKE, *Die Steuerrechtsordnung*, 2<sup>nd</sup> ed., Verlag Otto Schmidt, Köln, 2000, p. 118.

<sup>10</sup> See RENAUD BOURGET, “La science juridique et le droit financier et fiscal. Étude historique et comparative du développement de la science juridique fiscale” (fin XIX<sup>e</sup> et XX<sup>e</sup> siècles), Dalloz, 2012, p. 792.

<sup>11</sup> ANTHONY INFANTI, “Tax equity, in *Critical Tax Theory – an Introduction*,” Cambridge University press, 2009, p. 62.

(rules), (ii) the special relations between those norms and Tax authorities, (iii) the “sensibility” of the legal tax order, and (iv) the privatization of tax procedures.

(What concerns the more relevant issue having in mind the purposes of this work — the *de-judicialization* of tax conflicts) — special attention will be paid on the next section (point 4.)

Let us try to know better those dimensions.

In the first place, in the moment of design (conception) of tax norms<sup>12</sup>, contemporary tax systems frequently use vague or indeterminate concepts<sup>13</sup> and give tax authorities more or less extensive interpretation boundaries, repealing the ancient readings of the *lex stricta* principle. It usually happens because tax laws must cover a large number of abstract and very complex situations, and, as can be easily concluded, a strict and rigid law could neglect or “forget” some relevant matters and be seen as incomplete. Consequently, law-makers necessarily use “elastic” concepts, such as “special relations”, “tax havens”, “disabled person”, “health expenditures”, or “effective management”, just to refer some of the most commonly used. However, it is important to remark two points: first, this interpretation boundaries should not be granted on matters covered by the Parliaments’ reserve (i.e., matters protected by the legal type of tax,

<sup>12</sup> As it is well known, several criteria have been proposed to distinguish the two main categories of norms: principles and rules. An adequate combination of those criteria allows the following conclusions: (i) Principles have an axiological dimension in the sense that they incorporate structural values (are their legal expression), while rules have a more basic meaning, respecting to less important aspects of legal regulation; (ii) Principles are “intangible” while rules are concrete. These ones do present an operative connection between a fact and the legal system; (iii) Principles are applied “by means of a dialectic process of complementation and limitation”, while rules are applied on the basis of an “all or nothing” (“*Alles-oder-Nichts*”) method. In face of a conflict or collision, principles can be harmonized among themselves, but rules can only “survive” if one of them is removed. See, for example, ROBERT ALEXY, “*Rechtsregeln und Rechtsprinzipien*”, in *Archiv für Rechts- und Sozialphilosophie*, 25 (“*Conditions of validity and cognition in modern legal thought*”), 1985, p. 14.

<sup>13</sup> In the text, the terms “vague” and “indeterminate” — and the correspondent ideas of vagueness and indeterminacy — are taken as synonymous. However, some authors establish a distinction between them, as, for example, ANA PAULA DOURADO, “*The delicate balance: revenue authority discretions and the rule of law - some thoughts in a legal theory and comparative perspective*”, in *The delicate balance: Tax, discretion and the rule of law*, IBFD, Amsterdam, 2011, p.28.

using the expression of Ana Paula Dourado<sup>14</sup>); secondly, in these cases the judiciary power is perfectly free to control the use of those interpretation prerogatives by tax authorities.

In second place, with the intention of assuring an adaptable law application, the attribution of discretionary powers to administrative authorities is common. In fact, considering that sociological reality (which will constitute the basis of taxation) is complicated and profuse, and the lawmaker is not always capable of foreseeing it in all its relevant aspects — and sometimes he does not want it — some legal systems deliberately concede some permissive executive powers to those who apply it, which are commonly called “discretionary powers”. The latter are, in common words, leeway areas where the tax authority is able to choose between different possibilities, either because the legislator uses terms and expressions with facultative nature (such as “may” or “can” or “is authorized to...”), or because it allows several possibilities between a *minimum* and a *maximum*. Just consider, for example, the frequent powers to authorize fractional payments (or not to authorize), to reduce penalties for the infringement of tax laws (or not to reduce), or even to determine the amount of those penalties (bearing in mind the gravity of the infringement)<sup>15/16</sup>. Naturally, these powers are not absolutely free, since administrative bodies and other entities must only exercise discretion within legal boundaries, that is in accordance to legal requirements (for example, only when authorized by law and always acting with impartiality and presenting the reasons of its decisions). It is also important to mention that, although similar, this one is a different situation from the above-mentioned in (i), since here, in principle, the judiciary power is not authorized to exercise full control over the administrative decision – in reality, it is only authorized to control the observance of basic legal requirements.

In third place, a flexible tax system tends to be *careful* and *friendly*, trying to pay attention to the taxpayer’s particular conditions, specifically his/her economic and financial adversities. Here, the main idea is that the tax administration does not act exclusively as a mere tax collector, but as

<sup>14</sup> See, once more, ANA PAULA DOURADO, “*The delicate balance: revenue authority discretions and the rule of law*”, cit., p.16.

<sup>15</sup> RICHARD K. GORDON, “*Law of Tax Administration and Procedure*”, in *Tax Law Design and Drafting*, vol. 1, International Monetary Fund, Victor Thuronyi ed., 1996, p.10.

<sup>16</sup> As an example, see the Article 91 (9) of the Portuguese general tax law.

a persecutor of public interest in general, where equity, fairness and individual justice must be included. In this context, some legal systems prescribe the possibility of “special assessments for reasons of equity”, as for example, the German one, where the *Abgabenordnung* clearly prescribes that taxes may be assessed at a lower amount when the levy of the tax would be inequitable depending on the individual case. Similarly, individual bases of taxation may be ignored or the tax debt may be deferred or remitted<sup>17</sup>.

Finally, another special feature must be stated: the increasing tendency to “privatization” of tax procedures and actions, denoting that classical approaches are declining in influence. In fact, it is more and more common the concession, directly by the legislator, of legal powers (better said: “duty-powers”), to private persons or entities, in order to execute tax norms and supervise (oversee) the accomplishment of tax duties by other taxpayers<sup>18</sup>. That is the case, among others, of self-assessment duties, where the assessment of tax is performed, not by administrative organs, but by the taxpayer himself, not only providing essential information, but also calculating the tax basis and the tax amount. Similarly the collection of several relevant taxes is performed via withholding duties imposed to non-public entities, such as private employers or banking entities. Finally, in this particular context, also tax audit or tax control prerogatives can be mentioned, insofar as public power “use” private players (mostly legal and tax professionals, such as lawyers, notaries, solicitors, accountants, auditors, etc.) in order to control taxpayers’ illegal actions, setting special information duties<sup>19</sup>.

Beyond these four propensities to flexibility, *post-modern* tax systems can recognize another one: the trend to adjudicate the final resolution of conflicts (the last word about those conflicts) to entities different from the traditional courts or judges. However, as it was above said, this topic will be analysed on a specific section, on the following developments.

<sup>17</sup> See Articles 163 (Abweichende Festsetzung von Steuern aus Billigkeitsgründen), 222 (Stundung), and 227 (Erlaß) of the *Abgabenordnung*.

<sup>18</sup> In Portuguese literature, a good reference to this tendency can be seen in HUGO FLORES SILVA, *Privatização do Sistema de Gestão Fiscal*, Coimbra ed. Coimbra, 2014. See also, once again, RICHARD K. GORDON, “*Law of Tax Administration and Procedure*”, cit., p.14.

<sup>19</sup> Still using the Portuguese legal order as an example, see Decree-law no. 29/2008, which establishes a wide number of “communication and clarification duties” having in mind the need of prevention and repression of “abusive tax-planning”.



At the moment, it is important to emphasize the fact that the abovementioned flexibility does not mean — better said: cannot mean — a “lawless area” (*rechtsfreienRaum*) or the “dark room of the rule of law” (*Dunkelkammer des Rechtsstaats*<sup>20</sup>), since vagueness, permissiveness or openness are still zones inside the limits of law and covered by jurisdictional control (although sometimes *limited* jurisdictional control). It is undeniable that these concessions and prerogatives can put in a situation of crisis important dimensions of the rule of law principle, but it is also certain that the traditional general principles concerning tax procedure<sup>21</sup> — namely, law precedence and prevalence, legal certainty, proportionality, impartiality, participation (hearing), confidentiality and legal due process — are still to observe and still establish limits to irregular or erratic actions. Inside a real and responsible democratic and lawful State, this essential core cannot be infringed or trespassed in any circumstances.

It is now time to move on to the topic of resolution of conflicts.

#### 4. Tax law and the alternative dispute resolutions procedures

As mentioned above, the post-modern way of thinking assumes the disempowerment of the State even from a jurisdictional point of view, that is to say, even from the point of view of the resolution of (tax) disputes by conventional courts. In this sense, the reference to “alternative” dispute resolution mechanisms or procedures is common; “alternative”, because they

<sup>20</sup> In this sense, see, for example, JAN OSTER, “*Das informell-kooperative Verwaltungshandeln Umweltrecht. Begriffliche Abgrenzung, Erscheinungsformen und rechtliche Bewertung*” in *Natur und Recht*, 30, 2008, p. 846 and 848.

<sup>21</sup> For the purposes of this work, a precise and specific notion of tax procedure will be adopted, distinguishing it from tax process. It is certain that both the procedure and the process are a complex of acts — i.e., a chain or a sequence of acts with a precise objective or goal — but they are distinguished on the basis of a subjective criterion: the procedure is a sequence of acts set out by law which establishes the course of action (*modus operandi*) in order to perform an administrative act; while the process is a sequence of acts set out by law in order to emanate or perform a jurisdictional act. It is important to note that this sequence is most of the times legally bound, which means that it cannot be changed, despite the possibility of the existence of some discretionary acts. Concerning specifically tax procedure, those stages or phases are generally the following: initiation, by the tax authority (by official duty) or by taxpayers; investigation (establishment of facts); hearing, decision and notification (publicity). In Portuguese literature, see our *Lições de procedimento e processo tributário*, Coimbra editora, Coimbra, 2014.

emerge outside the traditional or customary methods of solving conflicts, frequently appealing to the interested parties themselves or requesting the interference of non-classic judges.

It is possible to find objective and subjective motivations to the legal establishment of these kinds of mechanisms. In fact, from an objective point of view — considering the entire legal order as a whole —, the “pendency-argument” is frequently used: the devolution of jurisdiction to other players can contribute to the substantial reduction of the number of cases undecided in courts, achieving a more efficient justice, since the judges get the same time to decide less disputes. From this standpoint, the constitutional requirements of effective justice are, or can be, better achieved. From a subjective point of view, it is frequently said that these alternative means are less formal, friendly, not so traumatic and even more economical than the (commonly denoted) long-lasting, distressing and expensive jurisdictional process.

Actually, informality is the keyword: the outcome of the process, not being so dependent on formal legal exigencies, can be adapted to the needs of the concrete litigious situation, even allowing the parties themselves to define the course of action. In extreme situations, they can also have the competence to define their own competence (competence of the competences, *Kompetenz-kompetenz*<sup>22</sup>), i.e., the prerogatives to say if they are or not able to intervene on the concrete dispute. As a direct consequence of this aspect, the degree of accomplishment of an achieved agreement is probably higher than using the traditional ways. Furthermore, in the absence of conflictive dimensions, the final decision will possibly contribute to maintaining or improving future relationships (even knowing that this argument in tax law is not very persuasive).

It is important to highlight the fact that those procedures can have either voluntary or compulsory nature, in the sense that in some cases the parties are “free to choose” whether to use them or not, but in other situations they are effectively bound by them, because it was previously so established<sup>23</sup>.

<sup>22</sup> CARLOS URIBE PIEDRAHITA, “*El arbitramento en Colombia, in Arbitrage y Mediación en las Américas*”, Centro de estudios de Justicia de las Américas and Universidad Autónoma Nuevo León, Vargas Viancos and Gorjón Gómez (coord.), p. 155.

<sup>23</sup> See YANNICK GABUTHY, EVE-ANGÉLINE AND LAMBERT, “*The Freedom to bargain and disputes’ resolution*”, in *European Journal of Law and Economics*, 36, 2013, p.373.

In order to get a better understanding on this subject, and establish a constructive basis for this analysis, it can be useful to distinguish between two different situations:

- a) On the one hand, situations where the conflict between tax administration and taxpayer<sup>24</sup> has not yet emerged (but it is plausible), and the procedures have *ex ante* nature and the purpose of preventing or anticipating it;
- b) On the other hand, situations where that conflict already exists, and, obviously, the procedures have *ex post* nature and are intended to solve it.

It is on the basis of this distinction, that this study will hereinafter proceed. First, reference will be made to preventive procedures (section 5.); after that, the attention will focus on reactive procedures (section 6.).

## 5. Preventive (*ex-ante*) procedures

Here, the main focus must be directed to those situations where the conflict between tax parties and has not yet occurred. Understandably, in these cases, the legal system must create mechanisms or procedures in order to prevent those antagonisms, having in mind the principle according to which tax courts must only intervene when a real conflict exists and there is no other acceptable way to solve it. In other words: the legal system must spare jurisdictional power of apparent or avoidable legal fights, which can be perfectly solved outside the traditional, longstanding and onerous ways.

From such a standpoint, it is possible to identify different procedures, established with the aim of preventing unnecessary tax disputes, such as (5.1) individual agreements and (5.2) collective agreements.

These agreements, in both of its types (individual or collective), at least from an abstract point of view, may refer not only to principal tax duties

<sup>24</sup> In the text, the reference to taxpayers includes not only the direct taxpayer (i.e., the person or entity directly related to the basis of taxation) but also other subjects, such as tax substitutes (for example in the situations of withholding obligations), tax successors (on the cases of succession of tax duties by death) and tax responsible (on the cases of secondary liability by tax debts of a third person).

(payment), but also to accessories ones (e.g., declarations, tax returns, business books). Likewise, they may cover either the early moments of tax procedure (for example, the evaluation / establishment of a tax basis), or the final moment (the assessment *strict sensu*/ quantification of tax amount).

In any case, the previous agreements — which are optional — can undoubtedly be seen as an important, simple and expeditious instrument to solve potential or probable tax controversies, acting in a preventive way and, as said before, in order to spare courts from avoidable disputes.

Furthermore, theoretically speaking, the mentioned instruments play an important role concerning the legal certainty principle. In fact, besides the prevention of conflicts and fights (*sociological perspective*), they introduce security and confidence from the point of view of taxpayers, since they believe that the tax administration will not act differently from what is prescribed in the agreement (legal perspective), and it is undoubted that a high level of knowledge and certainty of tax treatments is important for the business activity in general.

Let us try to see some legal examples, in order to better understand these matters.

### 5.1. Individual agreements

As was previously mentioned, it can be convenient to avoid the conflict by means of an individual arrangement — always under the law (e.g., regarding legal precedence and prevalence, impartiality and proportionality) — between the opponents.

It is the case, in the first place, of the well-known “closing agreements” (USA tax system)<sup>25</sup> or *accertamento con adesione* (Italy)<sup>26</sup>, where tax authority “is authorized to enter into an agreement in writing with any person relating to the liability of such person”. In these situations, the attained agreement — and, naturally, all its clauses — is legally binding and shall be considered “final and conclusive”, in the sense that it shall not be reopened, modified, or disregarded, even by means of judicial review (except in very exceptional situations, as fraud or other illegal behaviours). It is

<sup>25</sup> See § 7121 (Closing agreements) of the U.S. Code, title 26 (Internal revenue code), subtitle F (Procedure and administration), available at <http://www.law.cornell.edu/uscode/text>.

<sup>26</sup> See Decree- Law no. 218 of 19<sup>th</sup> June 1997 - “*Disposizioni in materia di accertamento con adesione e di conciliazione giudiziale*”, available at <http://www.normattiva.it/ricerca/semplice>.

important to remark that, in principle, this legal binding effect has only *inter partes* effectiveness, that is to say, the rights and duties agreed cannot be invoked by third parties.

Likewise, the German *Verbindliche Zusagen* (binding commitments)<sup>27</sup> can be seen as anticipating-conflict methods. Here, in the context of an external audit (tax control), it is possible for the tax authority to state a “promise” in writing concerning the facts contained in the audit report and the way they shall be treated for tax purposes in future similar circumstances. This commitment has undoubtedly binding effect (except, naturally, if it breaches legal prescriptions), can be cancelled only with *ex nunc* effect, and shall only expire when the legal provisions on which the decision is based are changed<sup>28</sup>. In the same context, also previous evaluations<sup>29</sup> or binding information<sup>30</sup> can be seen as forms of avoiding or preventing a tax conflict, for the reason that in both cases an important stabilisation *status* is obtained with the administrative decision (in other words: tax authorities may not subsequently proceed in a different way from the evaluation or information provided, except in compliance with a court decision).

In third place, and always as an exemplification, the “experts-procedures” can be mentioned, that is procedures in which the intervention of specialists is required, in order to reach an agreement regarding relevant aspects of the tax legal relation. It is what happens in reviews (re-examinations) of tax basis with the intervention of experts designated by both parties (tax administration and taxpayer), with the purpose of seeking an arrangement concerning the amount to be considered for latter assessment<sup>31</sup>.

In the same context, reference can be made to agreed audit reports<sup>32</sup>.

<sup>27</sup> See Article 204 of the German *Abgabenordnung* (German general tax code) accessible in [http://www.gesetze-im-internet.de/ao\\_1977/index.html](http://www.gesetze-im-internet.de/ao_1977/index.html).

<sup>28</sup> See Article 205 and 206 of the German *Abgabenordnung*.

<sup>29</sup> See Article 91 of the Spanish Ley General Tributária and Article 58 of the Portuguese Tax Procedure and Tax Process Code.

<sup>30</sup> See Article 68 of Portuguese general tax law.

<sup>31</sup> See, for example, the view mechanisms prescribed in the Portuguese general tax law (Article 91 – *pedido de revisão da material tributável*) or the Spanish Ley general tributaria (Article 135 - *Tasación pericial contradictoria*).

<sup>32</sup> See Article 155 of the Spanish Ley general tributaria.

## 5.2. Collective agreements

Here, the agreements are settled not with one taxpayer in particular, but with a group of taxpayers, represented by some kind of corporative entity (with public or private legal nature), such as professional orders, syndicates, labour unions, chambers of commerce or industry, etc. Although these types of arrangements are not very common, the truth is that they are perfectly possible in some legal orders, under some specific requirements. It is the case, for example, of the Spanish “social collaboration” (*colaboración social*), in which agreements can be realized in order to simplify the accomplishment of tax duties, as the fulfilment of tax returns or the featuring of technically complex operations (for example, self-assessment acts or withholding obligations)<sup>33</sup>.

## 6. Reactive (*ex-post*) procedures

As opposed to the legal mechanisms or instruments mentioned above, the reactive procedures take place after the emergence of the conflict between the parties — the dispute effectively arose and it was not possible to solve it by means of previous agreements or simple dialogue —, and comprehensively, their aim is to solve it. In reality, it is here that the expression “alternative” can be used in a proper and strict sense, contrary to the standard litigation.

Having in mind that other procedures can be named, it is acceptable to say that (6.1) transaction (conciliation), (6.2) mediation and (6.3) arbitration deserve special emphasis<sup>34</sup>.

### 6.1. Transaction (conciliation)

The first instrument that can be appointed as an alternative to the traditional jurisdictional way is the transaction, also frequently named concilia-

<sup>33</sup> See Article 92 of the Spanish Ley general tributaria.

<sup>34</sup> In addition to the mechanisms referred on the text, another can here be mentioned: the possibility of an agreement during the jurisdictional process. See, for example, the § 79 of the German *Finanzgerichtsordnung* (FGO) or the Article 112 of the Portuguese general tax law. Anyway, it is not absolutely correct to speak of alternative nature, since the conflict is effectively being decided in a traditional court.

tion. It is a real approach to the post-modern idea of *self-composing interests*, in the sense that the parties/subjects of the tax legal relation try to solve their opposition(s) amongst themselves, by means of mutual and reciprocal concessions. In fact, in these cases, there is no intervention of third parties (mediators, arbitrators), but solely the involvement of the proper dissenters, even in those situations where “conciliation services” are created (since they are established “inside” Tax administration). This happens, for example, on the Belgian<sup>35</sup>, Italian<sup>36</sup> or Brazilian<sup>37</sup> legal orders.

In general, the conciliation procedure can be started by either parties, can be more or less formal, and can cover a large range of matters, such as the documentary accessory duties (tax returns, accounting books, etc.), the value of goods, the results of an estimation of tax basis, the penalties, fines and charges, and even the tax amount itself. Anyway, it is important to remark that some matters can be excluded from transaction by legal determination, specially having in mind the traditional tax principles (e.g., legality, legal certainty and impartiality).

The final result is usually a statement which has *inter partes* binding effect and frequently implies the renouncement of future access to Courts, regarding the same legal questions or matters.

In this sense, it can be seen as a useful instrument to decompress the jurisdictional power.

## 6.2. Mediation

Generally, mediation consists of a method of resolution, where dissenting parties demand the intervention of a neutral third person or entity (mediator, moderator), in order to solve their conflict, but with non-binding effect. This means that those parties are not obliged by the conciliation decision: they are free to follow it or not.

Naturally, in these situations special exigencies concerning the selection of that third person or entity must be observed, regarding mostly his

<sup>35</sup> See Article 116 of the Law of 25<sup>th</sup> April 2007 (*Loi portant des dispositions diverses - IV*) and Article 1 of the Royal Decree of 9<sup>th</sup> May 2007 (*Arrêté royal portant exécution du Chapitre 5 du Titre VII de la loi du 25 avril 2007*), both accessible at <http://droitbelge.be/codes.asp>.

<sup>36</sup> See the Article 14 of the supra-mentioned Decree- Law no. 218 of 19<sup>th</sup> June 1997.

<sup>37</sup> See, for example, Article 156 (3) and 171 of the Brazilian tax code (*Código Tributário Nacional*), available at [http://www.planalto.gov.br/ccivil\\_03/leis/L5172Compilado.htm#art218](http://www.planalto.gov.br/ccivil_03/leis/L5172Compilado.htm#art218).

impartiality and knowledge. Indeed, it has to be someone with no kind of professional, economic or personal direct or indirect relation to the parties, and must be a specialist in the field under decision.

One relevant example of true mediation in tax matters can be found on USA's tax system<sup>38</sup>.

As it was mentioned above *a propos* the alternative methods in general, also the mediation procedure is largely guided by the informality principle: it is usually a simple and easy sequence, wherein the mediator has freedom to define the dissent questions (naturally, involving the parties), to hold meetings, to guide the debates and to make suggestions with the intention of resolving the disagreement, always with a persuasive approach towards middle ground. Anyway, the result of this procedure can hardly be seen as a “decision”, at least as a formal one.

### 6.3 Arbitration

Similarly to what occurs in mediation, arbitration also depends on the intervention of a third person (arbitrator<sup>39</sup>) to solve the dissent, but here with compulsory effect, which means that parties are not free to decide if they accept (or not) the final decision<sup>40</sup>. In practical terms, the arbitration decision has the same value as a traditional court verdict, not only from a formal, but also from a material point of view. Anyway, some differences can be found, such as the increased possibility of achieve a more accurate technical decision — since the arbiters are (or must be) selected for their expertise and reputation — or the “less adversarial” nature of arbitration, which can potentiate the maintenance of constructive relationships (beyond, naturally, the more probable celerity)<sup>41</sup>.

There are not many examples of tax legal systems that have introduced arbitration as an alternative and real form of solving tax conflicts, but

<sup>38</sup> See, once again, the U.S. Code, title 26 (Internal revenue code), Subtitle F (Procedure and administration), § 7123 (b) (1).

<sup>39</sup> In order to assure the demands of impartiality and know-how, the above mentioned requirements concerning the mediators must be here applied. See *supra* 3.2.

<sup>40</sup> See U.S. Code, title 26, subtitle F, § 7123 (b) (2).

<sup>41</sup> See — although referring to another subject (international arbitration) —, BRUCE L. BENSON, “To Arbitrate or To Litigate: That Is the Question”, in *European Journal of Law and Economics*, 1999, p. 8.



amongst them can be pointed the USA<sup>42</sup>, Venezuela<sup>43</sup>, or Portugal<sup>44</sup>. Nevertheless, many others have maintained some resistance, mostly having in mind the above-mentioned traditional tax principles, in particular the persecution of public interest by means of exclusively state organs.

## 7. Conclusions

After having said all the above, most of it with descriptive purposes, it is possible to align some concluding remarks. Here, more than the replication of the exposed ideas, the alignment of some personal annotations about these matters can be useful, which, in a simple manner, can be exposed as follows.

First of all, it is possible to conclude that the problems concerning the alternative ways of solving disputes cannot be seen from an isolated point of view, but only integrated in a broad and extensive structure of reasoning, including also the same problems regarding the legislative and the administrative powers. That structure is (legal) post-modernity. It means that only trying to understand what post-modernity is, especially from a legal point of view, it can be possible to recognize the real questions in discussion and the rational framework on which they are placed. Besides other relevant dimensions, the philosophical idea of *deconstruction* and the increased tendency to the disempowerment of the traditional State structures, organs and competences cannot be forgotten, which contributes to the weakness of legitimacy of courts and their decisions.

In second place, the idea that it is not prudent to accept a new approach just because it is new must be regarded. The reference here is made to post-modern ideas themselves, and adapting the words of Lawrence Zelenack, we can say that the post-modern authors certainly have no

<sup>42</sup> See U.S. Code, title 26 (Internal revenue code), Subtitle F (Procedure and administration), § 7123 (b) (2).

<sup>43</sup> See Article 319 of the Venezuelan *Código Organico Tributario*, available at: <http://www.conapri.org/Descargas/GacetaOficialExtraordinariaN6.152.pdf>.

<sup>44</sup> See Decree-law no. 10/2011 of 20<sup>th</sup> January 2011, available at: [http://www.caad.org.pt/userfiles/file/CAAD%20-%20DL%2010\\_2011%20Arbitragem%20TRIBUTARIA%20-%202011-01-20.pdf](http://www.caad.org.pt/userfiles/file/CAAD%20-%20DL%2010_2011%20Arbitragem%20TRIBUTARIA%20-%202011-01-20.pdf).

monopoly on one-side analysis<sup>45</sup>. It is unquestionable that times are continuously changing and legal orders (systems) must be oriented to the new challenges, under penalty of remaining deteriorated, fragmented, and lack in. However, an incautious commitment to the post-modern ideas probably put in crisis some fundamental dimensions acquired with the modernity and which are seen as the vital basis of the rule of law and democracy, such as representativeness, legal due process, the judges independence and the separation of powers, amongst others. It means that these dimensions must be considered untouchable acquired prerogatives, despite the acceptance of new procedures, new processes and new legal mechanisms.

In any case, the expression “alternative” denotes *per se* and from the outset the secondary or subsidiary nature of these instruments<sup>46</sup> and even a certain degree of mistrust of traditional means. If not, they would not be commonly denoted as “alternative”, but as “second generation” or something similar. If this one is a right perspective, we can only disagree with the adhesion to alternative means founded on reasons of suspicion and distrust.

Anyhow, having these cares in mind, it is, in fact, perfectly possible to conceive alternative means to solve conflicts, particularly in tax law, and thus recognize innovative legal approaches and regimes, in order to achieve a better justice, from an objective point of view. Simultaneously, it is possible to conceive less formal, friendly, not so traumatic and possibly more economic instruments than the traditional ones. On this context, arbitration is certainly seen as one of the more distinguished instruments to accomplish that goal and it currently begins to be prescribed in some legal orders as a valid process. Nonetheless, it is not the only one, and probably it is not even the most relevant or important, from a practical point of view.

In our opinion, when the debate is about alternative ways of solving tax conflicts, the main focus must be pointed on previous mechanisms, namely on the legal permission to celebrate individual or collective tax agreements, in order to unburden the activity of traditional courts.

All these considerations are framed by the new conception of flexible tax law, in the sense that a new tax legal system must be adaptable to new difficulties and challenges, being capable of paying attention to concrete

<sup>45</sup> LAWRENCE ZELENACK, “Taking critical tax theory seriously” in *Critical Tax Theory – an Introduction*, Cambridge University press, 2009, p. 379.

<sup>46</sup> See, again, CARLOS URIBE PIEDRAHITA, *El arbitramento en Colombia*, p. 154.

problems and individual requirements of equity and accept cooperative solutions.

“Briefly”: alternative methods can be seen as a real and profitable way of solving tax conflicts, but they cannot suggest the collapse of the more relevant dimensions of important legal principles.